



**UNIVERSITI PUTRA MALAYSIA**

**UNCONSCIONABILITY IN THE LAW AND PRACTICE OF  
FRANCHISING**

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# **UNCONSCIONABILITY IN THE LAW AND PRACTICE OF FRANCHISING**

**By**

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**Thesis Submitted to the Graduate School of Management,  
Universiti Putra Malaysia, in Fulfillment of the  
Requirement for the Degree of Doctor of Philosophy**

**April 2008**



**To my parents Mohd. Ishan bin Abd. Rahman and Atemah bt. Hashim;  
my dearest husband Zaidi bin Adam and my son Ahmad Basri.**



## **ABSTRACT**

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Abstract of thesis presented to the Senate of Universiti Putra  
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of Philosophy

### **UNCONSCIONABILITY IN THE LAW AND PRACTICE OF FRANCHISING**

By

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**APRIL 2008**

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This study examined the operation of unconscionability in the law of franchising and the nature of existence of unconscionability in practice of franchising. Franchising is relatively a new branch of commercial law and practically opened to various forms of abuses by the franchisors and franchisees. Meanwhile, unconscionability has a rather uncertain scope within the general sphere of contract law. It is therefore, important to also identify the true nature of franchising, the development of unconscionability and its relationship with the relevant contractual theories and other doctrines or notions, the probabilities of unconscionable practices in franchising and the totality of the whole spectrum of the idea of unconscionability from the legal perspectives.

Applying the qualitative approach by means of inductive reasoning using the historical research method, this study found that franchising resulted from the commercial practices or conveniences rather than any legal tradition. It is multidimensional in nature, which incorporates, among other, the concept of

contract law, a notion of licence and some features of usufruct. Unconscionability is the most proper doctrine to deal with the abuses and unfair practices that occur in franchising. In fact, there are probable occurrences of unconscionable practices in franchising in Malaysia based on the empirical studies of actual cases. As unconscionability is still evolving and the formulation of another parameter could still be contemplated, a new parameter is proposed in this research whereby the broad doctrine of unconscionability encompasses fairness, good faith, fair dealing and undue influence, while inequality of bargaining power and honesty in certain circumstances become the supporting factors in proving unconscionability.

From this research, it is concluded that unconscionability is the situation whereby the contract is entered into, negotiated and obtained. As the contract is a bargain, when the bargain is unconscionable it becomes unconscionable bargain. Unconscionability is an essential doctrine in the law of contract and the formulation of the new parameters of unconscionability in the contract law is also applicable to the law of franchising. The parameters can assist in promoting conscionability in the franchise business environment locally and internationally.



Dengan menggunakan pendekatan kualitatif secara pentaakulan induktif melalui kaedah kajian berkaitan sejarah, kajian ini mendapati bahawa francais terhasil daripada amalan-amalan atau kemudahan-kemudahan komersil dan bukan daripada sebarang amalan perundangan. Ianya bersifat berbilang dimensi antaranya konsep undang-undang kontrak, idea lesen dan beberapa ciri 'usufruct'. Ketidakberhibaannya adalah doktrin yang paling sesuai untuk menangani penyalahgunaan-penyalahgunaan dan amalan-amalan tak adil yang berlaku dalam francais. Secara fakta, wujud kemungkinan amalan-amalan tak berhiba dalam francais di Malaysia berdasarkan kajian-kajian empirikal kes-kes sebenar. Disebabkan ketidakberhibaannya masih lagi berkembang dan perumusan had yang lain masih boleh lagi dilakukan, kajian ini mencadangkan suatu had baru dimana doktrin ketidakberhibaannya yang luas mencakupi keadilan, suci hati, urusan adil dan pengaruh tak berpatutan, manakala ketidakseimbangan kuasa dalam berurusan dan kejujuran dalam beberapa keadaan menjadi faktor-faktor yang menyokong pembuktian ketidakberhibaannya.

Daripada kajian ini, maka dapatlah dirumuskan bahawa ketidakberhibaannya adalah suatu keadaan dimana suatu kontrak dimasuki, dirundingkan dan diperolehi. Memandangkan suatu kontrak adalah merupakan suatu urusan, apabila urusan itu tak berhiba ianya menjadi urusan tak berhiba. Ketidakberhibaannya adalah doktrin asas dalam undang-undang kontrak dan perumusan had-had baru ketidakberhibaannya dalam undang-undang kontrak akan juga terpakai kepada undang-undang francais. Had-had ini akan

membantu menggalakkan keberhibaan dalam persekitaran perniagaan  
français di peringkat tempatan dan antarabangsa.



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I certify that an Examination Committee met on **22 February 2008** to conduct the final examination of **Zahira Binti Mohd. Ishan** on her **Doctor of Philosophy** thesis entitled "**Unconscionability in the Law and Practice of Franchising**" in accordance with Universiti Pertanian Malaysia (Higher Degree) Act 1980 and Universiti Pertanian Malaysia (Higher Degree) Regulations 1981. The Committee recommends that the candidate be awarded the relevant degree. Members of the Examination Committee are as follows:

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## DECLARATION

I hereby declare that the thesis is based on my original work except for quotations and citations which have been duly acknowledged. I also declare that it has not been previously or concurrently submitted for any other degree at UPM or any other institutions.



**ZAHIRA BINTI MOHD. ISHAN**

Date: 4 June 2008

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